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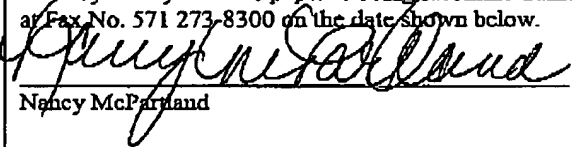
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Application No. 10/753,135
Filed January 7, 2004
Attorney Docket No. 047911/267214

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PRE-APPEAL BRIEF REQUEST FOR REVIEW (filed with the Notice of Appeal)		Docket Number 047911/267214
Application Number 10/753,135	Filed January 7, 2004	
First Named Inventor Allen		RECEIVED CENTRAL FAX CENTER NOV 22 2005
Art Unit 3635	Examiner J. Chapman	
<p>Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.</p> <p>This request is being filed with a notice of appeal.</p> <p>The review is requested for the reason(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided.</p> <p>Respectfully submitted,  Nicholas F. Gallo Registration No. 51,429</p> <p>Date <u>November 22, 2005</u></p> <p>Customer No. 00826 ALSTON & BIRD LLP Bank of America Plaza 101 South Tryon Street, Suite 4000 Charlotte, NC 28280-4000 Tel Charlotte Office (704) 444-1000 Fax Charlotte Office (704) 444-1111</p>		
<p align="center">CERTIFICATION OF FACSIMILE TRANSMISSION</p> <p>I hereby certify that this paper is being facsimile transmitted to the US Patent and Trademark Office at Fax No. 571 273-8300 on the date shown below.</p> <p> Nancy McFarland</p> <p align="right"><u>November 22, 2005</u> Date</p>		

Attachment
Reasons for Requesting Pre-Appeal Brief Request For Review

I. Claims 22 is not unpatentable over Cherry in view of Williams

Claim 22, rejected solely under § 103(a) as being unpatentable over Cherry in view of Williams, is directed to a flashing for use in a portal installation. The flashing includes a base member having first and second generally flat portions, which are disposed at a right angle so that their outer surfaces can be disposed against a sill and jamb. A front face plate extends from the first and second portions and lies in a plane that is common with edge edges of the first and second portions. For example, as shown in Figure 1 of the application, the front face plate 14 lies in a plane that is common with an edge of the first portion 20 of the base member 12 and an edge of the second portion 30 of the base member 12. Channels are disposed in the inner surface of at least one of the portions to direct water toward and through the front face plate, and the outer surfaces of the portions are substantially planar and free of channels.

Cherry discloses a sill flashing having a member 18 with upstanding flanges 23 and 24. The flanges 23 and 24 are bent from the sheet 18, as shown in Figure 1, and their confronting edges can be soldered together to define a corner 25. The flange 24 terminates in the plane of sheathing 11, which is on the exterior face of a stud frame 10. *See* page 2, lines 12-20; page 1, lines 75-82. Portion 26 “extends beyond the flange 24 to permit a marginal area 27 to be bent therefrom to define a turned down flange which contacts with the exterior surface of the lapping 12 underneath the sill 14.” Page 2, lines 22-27. Thus, the flange 24 ends at the outer face of the sheathing 11, while the portion 26 extends further outward to the outer surface of the lapping 12 on the outside of the sheathing 11.

Cherry does not disclose “a front face plate extending from end edges of the first and second portions which lie in a common plane, with the front face plate lying in said common plane,” as recited in Claim 1. In this regard, the Office Action indicates that the marginal area 27 of Cherry corresponds to the claimed front face plate; however, the marginal area 27 does not extend from flange 24 (which is indicated to correspond to the claimed second portion of the base member). That is, even if the marginal area 27 is considered to be a front face plate, the marginal area 27 does not extend from each of the first and second portions of the base member. In light of this deficiency of Cherry, the Office Action states that “it would have been obvious to extend the front face plate as shown by Williams in order to give the portal further protection.”

Office Action at page 3, paragraph 7. Applicant respectfully disagrees. Such modification of Cherry would not have been obvious for several reasons and, even if modified, would still not meet the terms of Claim 1, as explained below.

Cherry teaches that the flange 24 is formed by bending the member 18; however, the flange 24 does not extend forwardly all the way to the end of the marginal portion 27. Instead, the flange 24 ends at the outer surface of the sheathing 11, while the marginal portion 27 extends further past the outer surface of the sheathing 11 to the outer surface of the lapping 12. In fact, it is this very feature that allows water to be directed to the outside of the lapping 12. If the flange 24 were modified to extend forwardly all the way to the end of the marginal portion 27, it would not be possible to bend the marginal portion 27 or the extended portion of the flange 24 against the outer surface of the wall. That is, at the corner of the extended portion of the flange 24 and the member 18, the connection between those two members would prevent either from being bent flat against the outside of the wall. Neither Cherry nor Williams provides any teaching or suggestion for accommodating such a corner. In addition, even if the two members could be bent, e.g., by first cutting along the corner between the extended portion of the flange 24 and the member 18, the bent portions would extend separately from the flange 24 and the member 18, and therefore the bent portions would not comprise a single front face plate that extends from both portions of a base member.

Further, in light of the teachings of Cherry, it would not have been obvious to extend the flange 24 forwardly all the way to the end of the marginal portion 27 and then fold the extended portion of the flange 24 against the outside of the sheathing 11. In that case, the corrugations in the extended and bent portion of the flange 24 would be disposed horizontally, i.e., such that any water therein would be drained laterally behind the lapping 12. Neither Cherry nor Williams provides any suggestion for such a feature. In fact, Cherry specifically points to the corrugations 21 as preventing lateral seepage. *See* page 2, lines 52-64. Moreover, Cherry discloses that the marginal portion 27 is bent from the portion 26, and illustrates that the bent marginal portion 27 is disposed in a space between the outside of the lapping 12 and what appears to be a piece of molding disposed under the sill 14. *See* Figure 1. Thus, the marginal portion 27 extends beyond the lapping 12. The flange 24, on the other hand, terminates at the surface of the sheathing 11, i.e., inward of the lapping 12. No space is provided outward of the sheathing 11 for receiving a bent portion of the flange 24. That is, while the molding provides a space for accommodating

the bent marginal portion 27, no such space exists between the edge portion 15 of the sill 14 and the outer surface of the sheathing 11. Indeed, it appears that the edge portion 15 of the sill 14 is disposed flat against the sheathing 11 and/or the building paper 13 on the outside of the sheathing 11. Disposing a bent portion of the flange 24 would prevent the sill 14 from being disposed as shown. Neither reference provides any suggestion for disposing a corrugated member between the edge portion 15 and the wall, or any motivation for separating the sill 14 from the wall as would be required by the suggested modification.

Further, as noted above, the flange 24 terminates at the outside surface of the sheathing 11. Even if the flange 24 were somehow extended and bent outside the sheathing 11, the bent portion of the flange 24 would be disposed in a different plane than the marginal portion 27. That is, even if the flange 24 were modified as suggested in the Office Action, there would still be no "front face plate extending from end edges of the first and second portions which lie in a common plane, with the front face plate lying in said common plane." Instead, one portion bent from the flange 24 would be disposed in a plane proximate the outer surface of the sheathing 11 and the bent marginal portion 27 would be disposed in a plane proximate the outer surface of the lapping 12. That the bent portions could not lie in the same plane is evident from Figure 1, in which the edge portion 15 of the sill 14 would prevent any modified portion of flange 24 from being coplanar with the marginal portion 27. Two bent portions, extending separately from the flange 24 and the member 18, and lying in two separate planes, would not define a front face plate extending from each of the first and second portions of the base member in a plane that is common with the end edges of the first and second portions, as claimed. Indeed, such a configuration is precluded by the location of the edge portion 15 of the sill 14 of Cherry, which is located in the same plane as the marginal portion 27.

In addition, Claim 22 specifically recites that the channels are disposed in the inner surface of at least one of the first and second portions "with the outer surfaces of the first and second portions each being substantially planar and free of said channels." This feature can be seen in Figures 1 and 4 of the present application. Cherry, in contrast, discloses a corrugated structure in which the corrugations are impressed therein, i.e., by stamping (see, e.g., page 1, line 108 – page 2, line 11). Cherry does not teach such planar surfaces opposite the channels and provides no motivation for this modification. Indeed, neither reference discloses any member with channels on a surface opposite a planar surface.

For each of the above reasons, Claim 22 is allowable over the cited references.

II. Dependent Claims 23-27 are not unpatentable over Cherry in view of Williams

Claims 23-27 depend from Claim 22 and are also patentable for the above reasons. In addition, the various dependent claims provide additional bases of patentability over the cited references. In particular, dependent Claim 25 recites that "the channels do not extend through the end edges of the first and second portions which are opposite the end edges from which the front face plate extends." For example, as shown in Figures 1-3 and described in the application at page 5, lines 15-26, the channels 26 extend from the front face plate 14 toward the opposite edge (e.g., edge 16 of the second portion 30, opposite the front face plate 14); however, the channels 26 do not extend through the end edge 16. In this regard, the final Office Action states:

"Rutherford shows a flashing member with channels in first and second portions and the channels do not extend th[r]ough the end edges of the first and second portions; see figure 1. It would have been obvious to one of ordinary skill in the art to alternatively fashion the flashing of Cherry to not extend as stated above in order to provide a smoother transition between the face plate and the first and second portions."

Final Office Action, page 4.

Applicant disagrees. Rutherford is directed to a vent device. As shown in Figures 1a and 1b, the vent device has a channeling plate 12 having a plurality of vertically oriented channels 14. Although it is not clear to which figure the Examiner is referring, Applicant respectfully submits that both Figures 1a and 1b illustrate channels 14 that extend through the entire length of the channeling plate 12. Indeed, the channels 14 "provide a passageway for air and moisture." Col. 2, lines 54-58.

Moreover, even if Rutherford did describe channels that do not extend through the end edges as claimed, there is no motivation in these references to modify Cherry as set forth in the claim. That is, for example, in Cherry, the edge opposite of member 18 that is opposite the marginal portion 27 is defined by a bend provided to form the flange 23. Neither Cherry nor the other references disclose any motivation for not extending the corrugations to that edge, especially since the corrugations of Cherry extend not just to the edge but beyond it and through the flange 23. Regarding the supposed motivation set forth in the Office Action ("to provide a smoother transition between the face plate and the first and second portions"), Applicant respectfully submits that the marginal portion 27, which the examiner has indicated to

correspond to the claimed front face plate, is on the opposite side of the member from the edges in question (i.e., the "end edges of the first and second portions opposite the front face plate"). Therefore, even if the references did provide some motivation "to provide a smoother transition between the face plate and the first and second portions" as asserted in the Office Action, such a motivation would be wholly irrelevant to the claimed feature of the opposite ends of the channels, i.e., that "the channels do not extend through the end edges of the first and second portions which are opposite the end edges from which the front face plate extends." Thus, Claim 25 is allowable for this reason in addition to the above reasons regarding Claim 22.

Claim 26 further recites that "the channels are tapered so as to define an increased depth at the front face plate." For example, this feature is described in the present application as affecting the channeling of water through the front face plate. That is, "as shown in Figure 2, the channels 26, 36 are tapered in a direction away from the front face plate 14, i.e., each channel 26, 36 defines an increased depth at the front face plate 14. Thus, water in the channels 26, 36 generally flows toward the front face plate 14 and exits the channels 26, 36 through the front face plate 14." Page 5, lines 22-26. In other words, each channel has a depth that is increasingly greater toward the front face plate 14 so that water in each channel is directed to and through the front face plate 14. The Office Action states that tapered channels are shown in Figures 2-4 of Cherry, and the Examiner has apparently taken the view that the corrugations 21 of Cherry are "tapered" by virtue of their curved cross-sectional shape. Even if that is true, however, Cherry does not describe or illustrate any variation in the shape of the corrugations along their length. That is, as shown in Figure 2, the corrugations 21 appear to have the same depth at the end proximate flange 23 as at the end proximate the marginal portion 27. Applicant notes that Cherry does teach that the corrugations can drain water "exteriorly of the lapping 12" (page 2, lines 52-57); however, such drainage is apparently achieved by virtue of the angle at which the entire member 18 is disposed. This angling of the member 18 from the horizontal plane is clearly shown in Figure 1. Nevertheless, the corrugations 21 themselves are not "tapered so as to define an increased depth at the front face plate," as claimed. Instead, the depth of each corrugation 21 is uniform throughout. Accordingly, Claim 26 is allowable over the cited references for this reason, in addition to the reasons set forth above in connection with Claim 22.

Similarly, Claim 27 is allowable for the same reasons as Claims 25 and 26, in addition to those set forth above in connection with Claim 22.